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PAC TEL®
Corporation
A Pacific Telesis Company

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November 8, 1993



William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: ***GN Docket No. 93-252***

On behalf of PacTel Corporation, please find enclosed an original and six copies of its ***"Comments"*** in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Kathleen Q. Abernathy

Kathleen Q. Abernathy

Enclosures

ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| **IN THE MATTER OF** | ) | |
| | ) | |
| **IMPLEMENTATION OF SECTIONS 3(n)** | ) | **GN DOCKET NO. 93-252** |
| **AND 332 OF THE COMMUNICATIONS ACT** | ) | |
| | ) | |
| **REGULATORY TREATMENT OF MOBILE SERVICES** | ) | |



# COMMENTS OF PACTEL CORPORATION

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ATTORNEYS FOR
PACTEL CORPORATION

November 8, 1993

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**Summary**

In these Comments, PacTel Corporation ("PacTel") recommends that in resolving the specific issues raised in the Notice of Proposed Rule Making and in deciding how to deal in the future with various related issues, the Commission should be guided by five fundamental principles. First, when the Commission seeks to define and classify various services to determine the appropriate regulatory treatment, the type of service provided by a licensee -- not the frequency employed or the characterization of the licensee -- should be the determining factor. Second, licensees should be given maximum flexibility within statutory boundaries to provide special and unique mobile services in order to promote competition and the introduction of new and innovative services. Third, the regulatory burdens and requirements should be the same for all providers of the same type of service. Fourth, there should be maximum forebearance from regulation for commercial mobile service providers because mobile services are dynamically competitive. And fifth, those obligations currently imposed on certain dominant wireline carriers (i.e., interconnection, equal access, etc.) should not be imposed on competitive commercial mobile service providers.

PacTel believes that, as a general rule, private mobile service providers that offer some for-profit services should be deemed to be commercial mobile service providers only as to those particular commercial services that they offer. Conversely, providers of commercial mobile services should be able to use

excess capacity to offer private, truly customized mobile services and have such services treated as "private." PacTel also explains in these Comments that the legislative history of the term "functional equivalence" makes clear that that term limits, rather than expands, the scope of the private mobile services exemption from Title II regulation. Similarly, PacTel believes that the term "interconnected" as used in the new legislation must be viewed as limiting commercial mobile services to those services that provide subscribers with direct access to the public switch network. Further, PacTel strongly opposes any expansion of the scope of the public switch network concept, as well as associated interconnection requirements, since there is no statutory or public interest need to require commercial mobile service providers to interconnect with other carriers. Instead, the terms and conditions of interconnections by commercial mobile service providers should be left to the individual demands and particular needs of specific customers.

For determining whether a service is properly classified as a commercial mobile service, PacTel believes that the statutory phrase "substantial portion of the public" should include those services that are offered generally to the public without regard to limits on spectrum capacity or geographic coverage. Such an approach would allow commercial mobile service providers to provide certain unique or specialized services to individual customers or to a very limited group of customers on a private basis.

For those carriers that provide both commercial mobile services and private mobile services, PacTel believes that the Commission should continue its policy of promoting flexibility and competition by permitting licensees to use a self-determining notification process. Under such a system, licensees seeking to initiate a new type of service would provide a simple written notice to the Commission that would identify whether the service being provided is private or commercial.

Importantly, because commercial mobile services are certain to be dynamically competitive and because no commercial mobile service provider will possess market power or the ability to discriminate unreasonably in the provision of services, a policy of general forebearance from all Title II regulations (other than Sections 201, 202 and 208 as required by the statute) should undoubtedly be adopted.

Although commercial mobile service providers will still need the right to interconnect with wireline carriers in order for them to grow and to be fully competitive with non-mobile services, it would be completely counter-productive for the Commission to require commercial mobile service providers, which have no market power, to interconnect with all other carriers who request it. Finally, in evaluating any state petitions seeking to regulate commercial mobile service rates, it is vital that the Commission issue its decision as quickly as possible and that the Commission analyze both current and future market conditions. In making these decisions, the Commission must be forward looking

and take into account the effects of both actual and potential competitors, as these markets will undoubtedly become even more highly competitive over time.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| **IN THE MATTER OF** | ) | |
| | ) | |
| **IMPLEMENTATION OF SECTIONS 3(n) AND 332 OF THE COMMUNICATIONS ACT** | ) | **GN DOCKET NO. 93-252** |
| | ) | |
| **REGULATORY TREATMENT OF MOBILE SERVICES** | ) | |

## COMMENTS OF PACTEL CORPORATION

PacTel Corporation ("PacTel"), by its attorneys, hereby files these Comments in response to the Notice of Proposed Rule Making ("Notice") issued by the Commission on October 8, 1993.[1/]

PacTel Corporation, a subsidiary of Pacific Telesis Group, oversees the diversified PacTel Companies: Pacific Telesis International, PacTel Cellular, PacTel Paging, and PacTel Teletrac. As a major provider of wireless services in dozens of markets across the United States and an active participant in the development of personal communications services ("PCS"), PacTel has a strong interest in having equitable and flexible regulatory policies which facilitate competition and encourage rapid and efficient deployment of new technology, products, and services.

PacTel's qualifications to assist the Commission in this proceeding are based on our extensive experience in serving

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[1/] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Notice of Proposed Rule Making, GN Docket No. 93-252, released October 8, 1993.

customers on the move. PacTel Cellular and affiliated entities operate state-of-the-art "regional" cellular networks in California, Michigan, Ohio, Georgia, Kansas and Missouri, including one of the country's largest systems in Los Angeles, California. All of these systems have experienced rapid growth and the need for constant modification and innovation; for example, the Los Angeles system has grown from a handful of cell sites to over 300 today and has gone from one switch to four, including one of the first digital switches deployed by a cellular operator. PacTel Cellular has been at the forefront of efforts to use cellular spectrum more efficiently, and has worked closely with Qualcomm, Inc. on CDMA (Code Division Multiple Access) spread spectrum and digital technology over the past several years. PacTel's engineering credentials make us especially qualified to discuss wireless issues, including system growth and modification.

PacTel Paging is the third largest paging operator in the United States. PacTel Paging provides Improved Mobile Telephone Service ("IMTS"), one-way digital, alphanumeric, tone-only and voice paging, and air-to-ground service to over one million subscribers located in more than 100 markets throughout the United States, including markets in California, Arizona, Michigan, Texas, Florida, Missouri, Georgia, and Kentucky.[2/]

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[2/] Issues relating particularly to narrowband paging are discussed separately in additional comments filed by PacTel Paging.

## I. Background

The Omnibus Budget Reconciliation Act of 1993 amends Sections 3(n) and 332 of the Communications Act of 1934 and gives the Commission broad responsibilities to create a comprehensive framework for the regulation of mobile radio services. In the Notice, the Commission solicits comments on a broad array of questions as input into its ultimate determination of how various mobile services should be regulated in light of these statutory amendments. One of the preliminary tasks before the Commission is defining and classifying mobile services as either commercial or private for these purposes.

As part of this process, the Commission asks for comments on a number of issues and factors affecting the defined scope of each category of mobile service providers. The Commission also seeks comments on its dual tasks of assigning the existing common carrier services to the appropriate classifications for regulatory purposes and deciding the regulatory classification appropriate to the emerging personal communications services. Still further, the Commission looks beyond completion of the classification tasks and seeks comments on the extent to which it may be appropriate for the Commission to forebear from common carrier regulation of commercial mobile services. Another related issue on which the Commission invites comments concerns the rights of commercial mobile service providers to interconnect with the public switched telephone network.

PacTel's initial response to the extensive articulation of issues in the Notice is to offer several fundamental principles by which the Commission should be guided. In these comments, PacTel addresses the broad themes which recur throughout the Notice, without attempting to respond to each specific inquiry. Each of these principles, however, is responsive to several of the Commission's specific queries:

(1) In the Commission's quest for definitions and classifications which will form the predicates for regulatory applications, the type of service provided by a licensee, and not the frequency employed or the character of the licensee, should be the determining factor.

(2) Licensees should be allowed maximum flexibility within statutory boundaries to provide special and unique mobile services.

(3) Within classifications of mobile services, the regulatory burdens and requirements should be the same for all providers of the same type of service.

(4) With respect to all classifications of mobile service, there should be as much forebearance from regulation as is consistent with statutory requirements and public interest considerations, since the

mobile service markets are dynamically competitive.

(5) Current obligations of dominant wireline carriers (interconnection, equal access) should be clearly delineated but should not be imposed on the competitive commercial mobile service providers.

## II. Statutory Definitions

The statute divides mobile radio services into two categories: those which are subject to regulation under Title II of the Act and those which are not. The statute defines both "commercial mobile services," which are subject to common carrier-type regulation (except that the Commission may exempt them from provisions of Title II other than Sections 201, 202, and 208) and "private mobile services," which are not.[3/] "Commercial mobile services" are defined to include mobile services that are provided for profit and that are interconnected services available to the public or to a substantial portion of the public.[4/] "Private mobile services" are defined to include all mobile services that are neither commercial mobile services nor "the functional equivalent of a commercial mobile service."[5/]

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3/ 47 U.S.C. §§ 332(d)(1), (d)(3).

4/ 47 U.S.C. § 332(d)(i).

5/ 47 U.S.C. § 332(d)(3); Notice at ¶ 28.

### A. Commercial Versus Private Mobile Services

Many of the Commission's invitations for comments relate to the statutory criteria by which mobile services are defined as commercial. One such inquiry relates to whether, in applying the statutory for-profit criterion for defining a commercial mobile service, a non-profit service which sells excess capacity for profit should be deemed to be for-profit -- and therefore potentially a commercial mobile service -- to the extent of the for-profit business.[6/] In order to insure maximum flexibility and competitive opportunities, PacTel proposes that the Commission's classification of mobile service providers should turn on the character of the services offered. As a general rule, private mobile service providers which offer some for-profit services should be deemed to be commercial mobile services (and potentially treated as common carriers), but only with regard to those particular commercial services. Likewise, providers of commercial mobile services should be able to offer private, truly customized mobile services with excess capacity that may exist on their networks.

#### 1. Functional Equivalence

In the context of defining commercial mobile services, the Commission has expressed concern with interpretation of the "functional equivalence" language in the statute.[7/] The statute

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[6/] Notice at ¶ 12.

[7/] Notice at ¶¶ 30-33.

expressly excludes two categories of mobile services from the definition of private mobile systems: (1) any mobile service defined as a commercial mobile service and (2) any mobile service that is the functional equivalent of a commercial mobile service.[8/] In particular, the Commission inquires whether the functional equivalence concept was intended to expand the scope of private (therefore exempted) mobile service or to limit the scope of private mobile services by making "commercial" any mobile service that is "the functional equivalent of a commercial mobile service."[9/] PacTel submits that the functional equivalence concept limits, rather than expands, the scope of mobile services exempted from Title II regulation.

As the Conference Report itself makes clear, the functional equivalence language was intended only "to make clear that the term [private mobile service] includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service . . . ."[10/] However, the Commission suggests that Congress might have made only defined commercial mobile services subject to regulation under Title II, leaving all others not so defined in the catch-all category of private mobile services. This suggested interpretation cannot stand in the face of clear legislative history. Briefly stated, the original

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8/ 47 U.S.C. § 332(d)(3).

9/ Notice at ¶ 32.

10/ H.R. Rep. No. 213, 103d Cong., 1st Sess. 496 (1993), quoted in Notice at ¶ 31 (emphasis added).

legislative approach of defining private mobile services as all mobile services other than those services defined as commercial mobile services was abandoned in the Conference Committee when an affirmative exclusion from the definition of private mobile services (i.e., those services that are the functional equivalent of commercial mobile services) was added. The functional equivalence language seems to have been intended specifically to cover enhanced interconnected mobile radio offerings widely available throughout entire metro-areas, such as was involved in the creation of Enhanced Specialized Mobile Radio systems by Fleet Call/Nextel and others. The example given in the Conference Report was apparently added by the Conference Committee to demonstrate the reach of the "functional equivalence" test,[11/] since the statute would exclude an enhanced system like Fleet Call/Nextel's from being a private mobile service. The functional equivalence language operates to keep such services from being deemed private even if they do not meet one of the definitional criteria of commercial mobile services. However, where a system's characteristics, such as limited channel capacity or limited geographic coverage, preclude it from being functionally equivalent to a commercial service, it should then be defined as private.

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11/ Id.

## 2. Interconnection Issues

The Commission also makes several inquiries with respect to the definitional requirement that a commercial mobile service must be "interconnected" with the public switched telephone network.[12/] Specifically, the Commission asks for comment on whether a service should be regarded as an interconnected service if it does not afford a subscriber direct access to the public switched network but the service provider itself otherwise uses the public switched network.[13/] PacTel does not believe that a service should be deemed to be interconnected merely because the service provider, and not the end user, accesses the network. Virtually all mobile service systems access the network at some point, but the determinant of interconnectedness for these purposes should be whether the service's subscribers can access the public switched network in the traditional sense.[14/]

In its Notice, the Commission seeks comment on whether the public switched network should continue to be defined as local and interexchange common carriers or whether the definition of the public switched network should be expanded.[15/] PacTel

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[12/] Notice at ¶¶ 14-21.

[13/] Notice at ¶¶ 17, 19-20.

[14/] For example, because PacTel Teletrac's location and monitoring service subscribers do not have direct access to end users of the public switched network, PacTel Teletrac's services would not be classified as a "commercial mobile service."

[15/] Notice at ¶ 22.

strongly opposes any expansion of the definition of the public switched network and does not believe that any expansion is called for by the statute or otherwise. There is no statutory expression of Congressional intent for the Commission to deviate from its traditional definition of the public switched telephone network and no adequate reason for the Commission to do so on its own. There is especially no justification for extending the Commission's traditional, dominant wireline-carrier obligations to providers of mobile services. Although mandated interconnection to the public switched network is appropriate because of limited access to traditional switched voice services, the same is not true for the ten or more wireless service providers soon to be licensed in every market. Rather, it is important that interconnections with these new wireless networks be left to be decided by competitive market forces, which will certainly play a pivotal role.

Similarly, the terms and conditions of interconnections with commercial mobile service providers should be left to the individual demands and particular needs of specific customers. No single provider of commercial mobile services will possess market power; no single provider will control price or be able to discriminate successfully. To transpose wireline-based facility rules into competitive mobile services markets would be unjustified, would undoubtedly discourage investment and innovation, would inhibit growth and responsiveness, would waste

government resources, and would provide no countervailing public interest benefits.

### 3. Availability to the Public

The Commission also seeks guidance in applying the statutory criterion that a commercial mobile service must be effectively available to a "substantial portion of the public."[16/] One issue is whether services targeted to specific industry groups or limited in geographic coverage should be deemed to be available to the public for these definitional purposes.[17/] PacTel believes that it would be most equitable and administratively feasible to classify all mobile services offered generally to the public as commercial mobile services, without regard to limits on spectrum capacity or geographic coverage. If eligibility for use of the service is indeed very limited to a specialized group, and not generally available to the public, then it should be classified as a private mobile service. In general, the Commission should first determine the classification of a service by application of the statutory criteria, and then consider whether regulatory flexibility may be appropriate in order to insure the most competitive development of services within the commercial classification; but the Commission should not take on the burden of case-by-case examination of attributes of a mobile service, such as whether

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16/ Notice at ¶¶ 23-27.

17/ Notice at ¶¶ 25, 27.

the service employs frequency re-use or is limited to a particular geographic area.

PacTel also agrees with the Commission's initial conclusion that, in determining whether a service is being offered to the "public," there should be a "distinction between limited-eligibility services that are, as a practical matter, available to a substantial portion of the public and such services that are offered to small or specialized user groups."[18/] As the Commission recognizes, this approach "does not necessarily mean a service provider could avoid offering 'public' service merely by offering 'customized' service."[19/] However, in practice, PacTel expects that the distinction between a service that is somewhat "customized" but that is generally provided to the public, and those services that are so unique or specialized that they cannot be properly classified as being provided to the public will be relatively easy to determine. When a commercial mobile service provider agrees to provide to a single customer or a very limited group of customers certain unique services that, for whatever reason, are not being provided to others, such services cannot be properly classified as being provided to the "public" and therefore should be classified as private. Although PacTel expects that these situations will be unusual, the flexibility of commercial mobile service providers to offer such private services may be critically important for

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18/ Notice at ¶ 25.

19/ Notice at ¶ 25 n.31.

encouraging the development of innovative and highly productive services. For example, there may be situations where a technologically sophisticated potential customer might be willing to make the substantial investments necessary to help develop a new innovative product or service using wireless technology, but only if it can enter into a proprietary agreement with a mobile service provider regarding the unique or unusual uses of the spectrum. In such cases, commercial mobile service providers should be able to compete with private mobile service providers to obtain such business and to provide the new service on a proprietary basis. This approach would be consistent with the Commission's recognition that even traditional wireline common carriers are able to use their excess capacity to make special service arrangements available on a private non-common carrier basis.[20/]

## III. The Classification of Mobile Services

After its inquiries relating to the statutory definitions, the Commission seeks comments on a range of issues that may arise in the application of those definitions to existing mobile services.[21/] One such issue is how to classify for regulatory purposes those service licensees which are able to

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[20/] Notice of Proposed Rulemaking, Special Construction of Lines and Special Service Arrangements Provided by Common Carriers (CC Docket No. 84-369, FCC 84-146), 49 Fed. Reg. 19,528 (May 8, 1984).

[21/] Notice at ¶¶ 34-43.

provide both private and commercial mobile services.[22/] As mentioned before, PacTel believes that the classification, and thus the regulatory consequences, should turn on the type of mobile service being offered, in accordance with the statute. Classification should not turn on the frequencies assigned to the licensee, for this would seriously restrict the flexibility of licensees to respond to diverse market demands and, hence, competition.

PacTel strongly supports the continuation of the policy of flexibility and competition which permits a licensee to self-determine the types of services it will provide.[23/] Licensees should be given the choice of providing either commercial or private mobile services in the first instance and then offering both types of services if market opportunities warrant; under such a system of licensee self-determination, licensees would comply with the appropriate regulatory obligations applicable to a particular classification of service. Under such a system, a licensee seeking to initiate a type of service could provide simple written notice to the Commission with a minimum of paperwork and a maximum amount of competitive flexibility. Continued self-determination would be consistent, for example, with the increased degree of competition in the provision of the space segment capacity by satellite systems to providers of commercial mobile services. Similarly, as discussed above, it is

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[22/] Notice at ¶ 40.

[23/] See Notice at ¶ 46 n.67.

desirable that the Commission continue to encourage the growth and diversity of services which entail specially tailored contracts. Dual determinations by providers using the same spectrum (e.g., permitting common carriers to use excess capacity to provide unusual or unique custom-tailored, private services) would maximize competitive flexibility and innovation in service offerings.

To return to the general principles articulated earlier, once classifications of mobile services for regulatory purposes are determined, like services should be subject to like regulation. Where regulation is appropriate, parity should be the Commission's goal. If, for example, use of spectrum for private service offerings is allowed only where the capacity available to serve the needs of common carrier customers is adequate, cellular carriers seeking to provide private services with excess capacity and PCS licensees seeking to provide both commercial and private mobile services should be treated equally. Beyond this, however, minimum restrictions should govern the self-determination by licensees of the mix of private and commercial services which they choose to offer with their spectrum allocation.

## IV. Forebearance

Once the Commission has established the service classifications according to the statutory criteria and has applied those classifications to existing and future services for

regulatory purposes, there is still the question of whether the Commission should forebear from imposing any of the applicable regulatory requirements on any providers of commercial mobile services. While PacTel believes that it would be appropriate for the Commission to identify classes or categories of commercial mobile services and to promulgate regulations that vary from class to class, PacTel urges the Commission to adhere to the principle of "like regulation for like services." There should be very limited instances in which the Commission imposes different regulatory requirements on individual service providers within a class. Individualized regulatory treatment of providers of the same services would be antithetical to the very process of competition in which it is a given that there will be winners, losers and differences among players. In a competitive market environment, to treat individual providers within a class differently would only handicap certain competitors and reward others. Instead, winners in the battle of innovation and quality should be chosen by the marketplace, and the playing field within a class should, of course, be level.

Because the classes of commercial mobile services that the Commission will define are certain to be dynamically competitive, a policy of general forebearance from all Title II regulation (other than Sections 201, 202, and 208 as required by the statute) should undoubtedly be followed. In no commercial mobile services markets will any provider possess market power or the ability to discriminate unreasonably in the provision of

services, which are the core concerns underlying Title II regulation. The Commission's experience reveals that competition has flourished in markets where rate and other regulation has been foregone.[24/] That lesson should be heeded in the regulatory treatment of commercial mobile services. Only where dominant wireline common carriers are involved in commercial mobile services should the Commission impose regulatory safeguards against the exercise of market power.

## V. Interconnection

The Commission has also requested comments on the right to interconnect with common carriers.[25/] Obligations appropriately resting on wireline carriers should continue to be clearly delineated, but they should not be extended to commercial mobile services providers. In competitive markets, commercial mobile services providers still need the right to interconnect with wireline carriers in order to achieve growth and diversity.[26/] However, it would be wholly counterproductive for the Commission to require commercial mobile service providers,

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[24/] See, e.g., Request for Declaratory Ruling and Petition for Rulemaking, (RM No. 8179), filed by Cellular Telecommunications Industry Association and the supporting Comments filed therein (Jan. 29, 1993).

[25/] Notice at ¶ 70.

[26/] See, e.g., Need to Promote Competition and Efficient Use of Spectrum for RCC Services, 2 FCC Rcd 2910 (1987); An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, 86 FCC 2d 469, 495-96 (1981); Amendment of Part 21 of the Commission's Rules, 12 FCC 2d 841, 846 (1968).

which have no market power, to interconnect with all who request it. Instead, as noted earlier, interconnection decisions should be driven by market forces and decided by commercial mobile services providers on a competitive basis. Within commercial mobile services markets, interconnection options will assuredly be available to customers in response to their demand.

## VI. Preemption and State Petitions to Regulate Rates

The Commission has noted that, although the statute[27] preempts state and local rate and entry regulation of all commercial mobile services, states may petition the Commission to authorize state rate regulation on the basis of certain market conditions.[28] The Commission has requested comments on the factors that should be considered in establishing the procedures for responses to such petitions. The state petitions in question must be based on a showing that market conditions will not protect subscribers of commercial mobile services from unjust, unreasonable or discriminatory rates. PacTel proposes one factor that the Commission should consider in establishing the procedures for evaluating states' petitions and another factor that the Commission should apply in evaluating whether such petitions establish the required showing.

First, the threat of extended or newly initiated state rate regulation is likely to create substantial uncertainty among

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[27] 47 U.S.C. § 332(c)(3)(A).

[28] Notice at ¶ 79.